Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MICHAEL CROWLEY, et al,

Petitioners,

v.

CLEVELAND BROWN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent inmate was unhappy about a $6.00 charge to his prison account. He filed a complaint with the state police and the prosecutor that prison staff embezzled from his prison trust account. Prison staff investigating the report found it baseless and wrote a misconduct ticket against Respondent, but the hearing officer found Respondent not guilty. Respondent claims retaliation for exercise of his First Amendment right to seek redress of grievances. The Court of Appeals erred in defining what constitutes a retaliation claim under the First Amendment because it will result in strict liability -- or at least a triable issue of fact -- whenever a prison official cites an inmate for misconduct and the charge is subsequently set aside.

Whether the Court of Appeals' decision conflicts with decisions of this Court since it fails to appropriately balance the management needs of prison officials with the First Amendment rights of prisoners.

PARTIES TO THE PROCEEDINGS

On June 3, 1998, Respondent Cleveland Brown filed the complaint in this action. Respondent was an inmate who brought suit against various Michigan Department of Corrections officials at the Baraga Maximum Correctional Facility (AMF), located in Baraga, Michigan.

The Petitioners here are the defendants in this case: Michael Crowley, Warden; Daniel Lesatz, a case manager; Toni Joki, an accountant; and Janice Ansell, an administrative assistant.

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Petitioners seek review of the Court of Appeals decision in *Brown v. Crowley*, 312 F.3d 782 (6th Cir. 2002). This decision is reprinted in the Appendix to this Petition, App., p 1. On January 28, 2003, the Court of Appeals denied rehearing en banc in *Brown v. Crowley*, 2003 U.S. App. LEXIS 1765 (6th Cir. 2003), App., p 48a.

The decision of the United States District Court of the Western District of Michigan entered April 9, 2001 is not reported and is reprinted in the Appendix to this Petition, App. p 50.

A prior opinion of the Court of Appeals is *Brown v. Crowley*, 229 F.3d 1150, 2000 U.S. App. Lexis 21213, (6th Cir. 2000) (unpublished table decision), App., p 56a.

JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Sixth Circuit entered on November 27, 2002.

The Court of Appeals denied Petitioners' petition for rehearing with suggestion for rehearing en banc on January 28, 2003.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. Basis of jurisdiction for the district court

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 since Respondent raised a federal question. Respondent, a state inmate, sues pursuant to 42 U.S.C. § 1983 for an alleged violation of his rights protected by the First Amendment to Constitution of the United States.

B. Facts and Proceedings

Corrections officials transferred Brown to several different prisons. Inmate Brown believed corrections staff overcharged him for a prison debt incurred at a prison where Brown was previously incarcerated. The amount at issue was approximately fifty dollars. Brown filed several grievances and after corrections officials investigated the issue, they determined that Brown still owed approximately six of the fifty dollars. But Brown was dissatisfied with the grievance responses.

While one of his grievances was still pending, Brown contacted both the local prosecutor and the Michigan State Police complaining that prison staff had embezzled from his prisoner account. These agencies referred the issue to the Michigan Department of Correction's Internal Affairs division, who conducted an investigation. Internal Affairs concluded that there was no basis for the embezzlement claim.

Thereafter, Regional Prison Administrator Richard Johnson authorized Warden Crowley to have a misconduct ticket written against Brown for interference with administration of the rules, because the serious activity that Respondent had complained of, if true, could have resulted in criminal charges. Johnson indicated in his memo to the warden:

> Prisoner Brown, #167009 alleges that AMF [Baraga Maximum Correctional Facility] staff in prisoner accounting are **embezzling** funds from his account. This allegation has been investigated by Internal Affairs and found to be without merit.
>
> We have been seeing more and more of these false complaints lately. While I believe a prisoner should be able to file a legitimate complaint, they also should

> be punished for filing false complaints. Therefore, please issue a major misconduct ticket to the prisoner regarding this matter. [Emphasis added.]

On the warden's instructions, Daniel Lesatz, a case manager at AMF, wrote Brown a major misconduct ticket on April 21, 1998 for "Interference with Administration of Rules (023)."

The Michigan Department of Corrections provided Brown with a hearing before an attorney hearing officer. The hearing officer found Brown not guilty, stating that Brown's perception that the debt was already paid "is not unreasonable at all."

It is undisputed that Brown was classified to administrative segregation for other reasons prior to the issuance of the misconduct ticket for interference with administration of rules. Since he found Brown not guilty, the hearing officer imposed none of the sanctions for misconduct, such as loss of privileges, punitive detention or loss of good time.

Brown filed a civil rights action that the courts ultimately construed to state a claim for retaliation in violation of the First Amendment. The Petitioners here are the Defendants: Michael Crowley, Warden; Daniel Lesatz, a case manager; Toni Joki, an accountant; and Janice Ansell, an administrative assistant.

The Court of Appeals reversed the district court's initial summary judgment in favor of the Petitioners and remanded for further consideration of Brown's retaliation claim. After discovery, Petitioners again moved for summary judgment, and the district court granted the motion. Brown appealed again, and in a divided November 2002 opinion, the Court of Appeals reversed summary judgment, holding Brown had raised a genuine issue of material fact with regard to his retaliation

claim. The Court of Appeals indicated that, on remand, the Petitioners can again seek judgment based on qualified immunity, but declined to decide that legal issue at this juncture.

The dissenting opinion provides a comprehensive examination of the facts and legal issues concluding that the district court should be affirmed because (1) Corrections Officials are certain to prevail on qualified immunity since Brown alleges no conduct shocking to the conscience. Under the clearly established law in effect at the time, no reasonable prison official in the position of the Corrections Officials would have believed his conduct violated the First Amendment. Remand is therefore a waste of judicial resources. (2) The Court of Appeals majority applied the test it had announced in *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999), for First Amendment violations. That decision was issued after these events occurred, but even if it applies, the Petitioners Corrections officials still prevail on summary judgment because: (i) Brown's frivolous assertion that prison staff had embezzled from his prisoner account is not First Amendment protected conduct. (ii) Where Brown suffered no adverse consequences as a result of the misconduct ticket, he does not show conduct that would deter a person of ordinary firmness from pursuing his First Amendment rights in the future. A mere risk of adverse consequences does not meet this element. (iii) Where the ticket was issued because of the frivolous embezzlement claim, Brown fails to show that any of the Corrections Officials were motivated by any protected conduct in issuing the misconduct ticket.

Finally, the dissent argues that prison officials have the authority to punish prisoners for filing frivolous or false grievances or other complaints where processing them wastes substantial public resources. The courts have this remedy with respect to frivolous litigation and due deference to prison

officials requires that they also be permitted to seek to punish prisoners who waste state resources with frivolous complaints.

The Court of Appeals opinion recognizes that the Petitioners are entitled to a decision on the qualified immunity issue. In *Saucier v. Katz,* 533 U.S. 194 (2001) this Court clarified that in deciding qualified immunity issues, the courts must first decide whether the defendant's conduct comports with current law. Only if it does not, must the court decide whether the defendant's conduct comported with the law in effect at the time the events occurred. While Petitioners intend to pursue the argument that their conduct complied with the law in effect at the time they acted if this case ultimately returns to the district court, that argument is not the subject of this Petition. Here, Petitioners contend that they are entitled to judgment because they did not engage in unconstitutional retaliation, under current law, according to the definition of that claim that Petitioners urge this Court to adopt in this case.

The Petitioners are entitled to judgment for Brown's failure to state a claim upon which relief can be granted or for failure to raise a genuine issue of material fact.

REASONS FOR GRANTING THE WRIT

Introduction

Where an inmate has suffered no detriment as a result of receiving a misconduct ticket for which he was found not guilty, there is no First Amendment retaliation claim. The Court of Appeals' decision finding issues of fact here is erroneous. It allows an inmate who makes a baseless report of a "crime," and thereafter is charged with a disciplinary infraction, to go to trial on a First Amendment retaliation claim, even where the inmate suffered no detriment as a result of the attempt to discipline him.

In this case Respondent inmate did not receive a misconduct ticket because he grieved a problem with his prisoner account. Indeed, the Respondent was granted partial relief based on his grievance, reducing his debt from approximately $50.00 to approximately $6.00. Instead, the Respondent received the ticket because he filed what reasonably appeared to be a frivolous claim with the Michigan State Police, that corrections employees had **embezzled** from his prisoner account.

Despite the fact that Respondent here has no damages, and this case therefore has no significant monetary value, it is nonetheless a very important case for Petitioners and for state prison officials nationwide, since a claim for retaliation for the exercise of a Constitutionally protected right allows inmates to pursue claims for adverse actions by prison officials that, absent the allegation of a retaliatory motive, are not unconstitutional. Retaliation is therefore a very frequently litigated claim by prisoners.

The instant decision of the Court of Appeals deems an allegedly frivolous claim to be protected conduct. The decision also determines that a mere unrealized threat of disciplinary action is a sufficiently adverse action to support a constitutional violation. This threshold is so low that many such cases will now go to trial expending scarce judicial and state resources with little or no benefit to anyone.

Petitioners contend that the Court of Appeals erred (1) in its determination that a frivolous claim of embezzlement is First Amendment protected conduct; (2) in its holding that a mere unrealized threat of misconduct sanctions constitutes a sufficiently adverse action to sustain a retaliation claim; and (3) in its failure to recognize that legitimate penological purposes support prison staffs writing misconduct tickets to

discourage inmates from filing frivolous complaints that result in wasting prison investigative resources.

I. THE COURT OF APPEALS' TEST FOR DEFINING A RETALIATION CLAIM IS FLAWED.

The Court of Appeals erred in its definition of an actionable First Amendment claim for retaliation against a prison employee since it results in strict liability or at least a triable factual issue and affords inmates greater First Amendment protection than employees. The Court of Appeals applied the test for First Amendment retaliation claims that it developed in *Thaddeus-X v. Blatter,* 175 F.3d 378 (6th Cir. 1999). In *Thaddeus-X* the court issued an en banc splintered decision re-defining the elements of a First Amendment retaliation claim in the Sixth Circuit thus:

1) that the plaintiff engaged in protected conduct;
2) that a defendant took an adverse action against him that "would deter a person of ordinary firmness from continuing to engage in" the protected conduct; and
3) that a causal connection exits between the protected conduct and the adverse action, i.e. that a defendant "was motivated at least in part by the plaintiff's protected conduct." *Id.* at 394.

In addition, *Thaddeus-X* provides that where a defendant can show that he or she would have taken the adverse action regardless of whether the plaintiff engaged in the protected conduct, the defendant can prevail.

This test as applied in this case has resulted in several flaws. First, Petitioners contend element number one of this test is flawed, because it does not require that the "grievance" that triggered the alleged retaliatory act be nonfrivolous.

Second, Petitioners contend that the formulation of element number two of this test is flawed, because it does not require the inmate to show that he was subjected to an atypical and significant deprivation in relation to the ordinary incidents of prison life.

Significantly, the Court of Appeals' misapplication of the test in the instant case inappropriately expands inmates' First Amendment rights beyond those defined by this Court, and beyond those afforded to employees. Further, the Court of Appeals' decision in this case requires the courts to expend limited judicial resources with little or no benefit to anyone, contrary to the Court's caveat in *Sandin v. Conner*, 515 U.S. 472 (1995). Finally, it injects the courts into the minutiae of the internal operations of the state prisons, contrary to this Court's frequent admonitions. *Shaw v. Murphy*, 532 U.S. 223, at 228 (2001).

Third, Petitioners contend the Court of Appeals misapplied element number three of the test. Where Petitioners were motivated by the Respondent's frivolous embezzlement report, they were not motivated by any constitutionally protected conduct.

A. Only nonfrivolous claims constitute protected conduct

Respondent engaged in two distinct avenues of conduct: First he filed administrative grievances complaining about the handling of his inmate account funds, alleging he was being charged for a debt he had already paid. As a result his debt was reduced to approximately $6.00. Second, Respondent later contacted the local prosecutor and the Michigan State Police claiming prison staff had embezzled from Respondent's prisoner account. While the first conduct was protected speech, the second was not. The Court of Appeals opinion did not distinguish between the two acts, simply holding that

Respondent had a right to petition for redress of grievances. This element is inextricably linked to the third element of the test. Respondents contend that since the administrative grievances did not motivate the Petitioners to file a misconduct ticket against Respondent, it is irrelevant whether the administrative grievances were protected conduct. The only relevant act was filing the embezzlement report, which was not protected conduct.

Due to limitations on prisoners' rights, not every petition for redress of grievances constitutes protected conduct. This Court has long recognized that prisoners, due to their conviction and incarceration, have more limited First Amendment rights than do free citizens. *Jones v. North Carolina Prisoners Union*, 433 U.S. 119 (1976). In *Lewis v. Casey*, 518 U.S. 343 (1996), this Court held that the First Amendment does not require prison officials to facilitate all manner of litigation by prisoners. Instead, the First Amendment protects only litigation of a direct appeal of the inmate's conviction, a petition for habeas corpus, and suits for violation of constitutional or statutory rights relating to conditions of confinement. And, the Court further limited this First Amendment right to **nonfrivolous** legal claims. *Id* at 353.

In the instant case, Respondent's administrative grievances with respect to a claimed error in his prisoner account were nonfrivolous. His grievances resulted in an adjustment in the amount still owing. But Respondent's report that prison staff had embezzled from his prisoner account was baseless and therefore not protected. "Depriving someone of a frivolous claim . . . deprives him of nothing at all, except perhaps the punishment of Rule 11 sanctions." *Id.* at 353 fn.3. In the instant case, writing a misconduct ticket because Respondent made a baseless claim of criminal conduct does not in any way deny Respondent the right to petition for redress of grievances.

An additional factor in the need to redefine what constitutes protected conduct is the Court of Appeals' failure to recognize that prisoners have more limited First Amendment rights than do public employees or the general public. While government employees' speech is protected only if it relates to matters of public concern, *Connick v. Myers*, 461 U.S. 138 (1983), the Court of Appeals opinion holds that **any** inmate complaint about the conditions of his confinement is protected, as an aspect of the First Amendment right to seek redress of grievances. This is inconsistent with the legitimate needs of prison administration. The nonfrivolous limitation applied in *Lewis v. Casey* would serve the legitimate needs of prison administration, while still providing inmates with a broad First Amendment protection from retaliation.

Therefore, the baseless embezzlement report, which was the motivating factor for issuance of the misconduct ticket, is not protected conduct.

B. An adverse action must constitute an atypical and significant deprivation in relation to the ordinary incidents of prison life in order to state a claim for unconstitutional retaliation.

The Court of Appeals erred in formulating and applying this element of the claim: Did a defendant take an adverse action against the plaintiff that would deter a person of ordinary firmness from continuing to engage in the protected conduct? Petitioners contend that to accommodate legitimate penological purposes this element should be: Did the defendant impose on the plaintiff an atypical and significant deprivation in relation to the ordinary incidents of prison life?

1. Respondent lacks standing since he alleges no injury caused by any Petitioner.

Under any definition of an adverse action, the plaintiff has to prove some injury to demonstrate standing.

> [The standing] doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not. That is where the "actual injury" requirement comes from. Not everyone who can point to some "concrete" act and is "adverse" can call in the courts to examine the propriety of executive action, but only someone who has been *actually injured*. Depriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value -- arguable claims are settled, bought, and sold. Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions. [*Lewis v. Casey* at 353, fn.3 (emphasis in original).]

To meet the Article III standing requirement, the "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. at 751. As long as the injury is "distinct and palpable" rather than abstract, conjectural, or hypothetical, it is sufficient to confer standing. *Id.*

The sole adverse action Respondent complains of is a misconduct ticket for interference with administration of the rules. However, the hearing officer afforded Respondent a

hearing on the ticket within a few days and the hearing officer held Respondent not guilty of the misconduct. Respondent was housed in administrative segregation throughout this time period based on earlier misconduct and the misconduct ticket for interference with administration of rules had no impact on his classification to segregation. The majority opinion of the Court of Appeals recognized this and held that "the issuance of the major misconduct charge subjected him to the **risk** of significant sanctions." *Brown v. Crowley, supra,* at 789. The potential sanctions included loss of good time or disciplinary credit that could extend his minimum sentence, and punitive segregation. The Court of Appeals held that a reasonable jury could conclude that being subjected to the risk of these sanctions would deter a person of ordinary firmness from engaging in the protected conduct in the future, and the claim was therefore triable. *Id.*

Yet where, as here, Respondent was found not guilty of the misconduct and where he does not allege any distinct and palpable injury of any kind, the Court of Appeals failed to recognize Respondent's lack of standing. For this reason alone, Respondent failed to state a claim upon which relief could be granted.

2. The adverse action requirement as interpreted by the Court of Appeals inappropriately provides for greater protection for inmates than for employees.

As the Court of Appeals applied this element in the instant case, the inmate Respondent is inappropriately required to tolerate less than an employee.

For example, in *Virts v. Consolidated Freightways Corp.*, 285 F.3d 508, 522 (6th Cir. 2002), the plaintiff claimed defendants retaliated against him for exercising his rights under

Title VII of the Civil Rights Act of 1964. Though the defendant employer discharged the plaintiff, the plaintiff filed a grievance and the grievance committee reinstated plaintiff in his job and awarded him back pay. The Court of Appeals held that where the plaintiff had been made whole through the grievance process, the district court was correct to dismiss plaintiff's claim for retaliation.

Similarly, in *Dobbs-Weinstein v. Vanderbilt University* 185 F.3d 442, 545-46 (6th Cir. 1999), the plaintiff complained that she had been denied tenure based on race and gender discrimination. The plaintiff's department recommended her for tenure, but the acting dean did not concur and the university initially denied plaintiff tenure. Plaintiff filed a grievance, prevailed, and was granted tenure. Thereafter, plaintiff filed suit under Title VII of the Civil Rights Act. The court held that the where the plaintiff ultimately prevailed on her grievance, she did not allege a sufficiently adverse action. The acting dean's intermediate decision did not constitute an "adverse employment action" required to establish a prima facie case. *Id.* The court affirmed summary judgment for the defendant.

The parallels to the instant case are obvious. Here too, the plaintiff prevailed after receiving due process. Here too, the plaintiff did not suffer a sufficiently adverse action to constitute a problem of constitutional magnitude. Yet, the Court of Appeals' decision in this case provides the inmate plaintiff with broader protections than those available to employees. The test and its application are therefore flawed.

Inmates should be required to demonstrate a sufficiently adverse ultimate action comparable to failure to hire, employment discharge, failure to promote or failure to grant leave, as described in *Dobbs-Weinstein* at 546. "To hold otherwise opens the door to endless litigation of intermediate steps in an employment decision-making process that have no

effect on the ultimate outcome. . . . Where the tenure decision was following the chain of appeal, each decision along the way is not actionable. Only the final decision is the ultimate act." *Howze v. Virginia Polytechnic and State Univ.*, 901 F. Supp. 1091, 1096-97 (W.D. Va. 1995). In the prison context, intermediate steps should not be actionable either, otherwise the federal courts will unnecessarily interfere in the management of state prisons, and inmates will enjoy broader protections from retaliation than do employees.

Requiring a sufficiently adverse action is also consistent with the provisions of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), which requires exhaustion of administrative remedies: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." In *Burton v. Jones*, 321 F.3d 569 at ___; 2003 U.S. App. LEXIS 3646 at *11; (6th Cir. 2003), the Court of Appeals recognized that exhaustion allows state prison officials to address inmate complaints and reduces the number of lawsuits filed:

> Congress amended §1997e to reduce the quantity and improve the quality of prisoner lawsuits. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Administrative exhaustion reduces the quantity of prisoner suits by **giving state officials an opportunity to take corrective action** in response to prisoner grievances and, **thereby, eliminates the need for some claims to be litigated,** particularly frivolous claims. *Id.* at 525.

By allowing an inmate to bring suit despite his ultimately prevailing through the hearing procedures afforded him by the Department of Corrections, the Court of Appeals decision defeats a primary purpose of the Prison Litigation Reform Act

and erroneously expands inmate retaliation claims to minor inconveniences not cognizable in the employment context.

3. Legitimate penological concerns require that the second element of the test should be whether the adverse action imposes an atypical and significant deprivation in relation to the ordinary incidents of prison life.

Petitioners contend that a more appropriate second element for a retaliation claim would be to ask whether the inmate suffered an atypical or significant deprivation, in relation to the ordinary incidents of prison life. This Court articulated this limit in *Sandin v. Connor,* 515 U.S. 472 (1995), holding that a state does not create a protected due process liberty interest in any deprivation that does not meet this standard. In abandoning the previous approach of simply scrutinizing regulations for mandatory language, without regard to the seriousness of the deprivation, the Supreme Court denounced federal court interference with daily prison operations:

> . . . the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment. [*Id.* at 482.]

The Court of Appeals decision in the instant case is a prime example of the federal courts involving themselves in the daily operations of Michigan prisons, expending scarce judicial resources with no offsetting benefit to anyone. The reasoning that caused this Court to adopt the "atypical and significant deprivation" threshold for state-created liberties, argues for that

same threshold to apply to retaliation claims. Here, from the inmate's perspective, the state hearing system worked in his favor. He suffered no sanctions. Yet, the Court of Appeals would require a trial under these circumstances where no one was hurt in any way.

This Court has not limited the *Sandin* standard to due process claims. Recently, this Court invoked the *Sandin* standard in a Fifth Amendment self-incrimination case. In *McKune v. Lile*, 536 U.S. 24; 122 S.Ct. 2017 (2002), the plaintiff, a convicted rapist, claimed a Fifth Amendment violation when prison programming required him to participate in counseling that included admitting his past sexual misconduct. His admissions could potentially be used for further prosecution, though there was no indication that such admissions had ever been so used. In deciding that the programming requirement did not violate the plaintiff's Fifth Amendment right not to incriminate himself, a plurality of the this Court used the *Sandin* standard as a guide. The opinion recognized his refusal to participate in the programming would result in his transfer from medium to maximum security, causing visit restrictions, less access to the prison canteen, and limits on his possession of personal items. These did not constitute atypical and significant deprivations that would constitute compulsion. This Court found no Fifth Amendment violation.

In reaching its conclusion this Court reiterated the need to defer to state prison officials in the difficult task of managing prisons:

> The limitation on prisoners' privileges and rights also follows from the need to grant necessary authority and capacity to federal and state officials to administer the prisons. See, e.g., *Turner v. Safley*, 482 U.S. 78; 96 L.Ed.2d 64; 107 S.Ct. 2254 (1986). "Running a prison is an inordinately difficult undertaking that

> requires expertise, planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85. To respect these imperatives, **courts must exercise restraint in supervising the minutiae of prison life.** *Ibid.* Where as here, a state penal system is involved, federal courts have "additional reason to accord deference to the appropriate prison authorities." *Ibid.* [*Id.* at 122 S.Ct. at 2026. (Emphasis added).]

The *McKune* decision echoed the admonitions included in *Shaw v. Murphy*, 532 U.S. 223, 228 (2001): "Traditionally, Federal Courts did not intervene in the internal affairs of prisons and instead 'adopted a broad hands-off' attitude toward problems of prison administration. *Procunier v. Martinez*, 416 U.S. 396, 404 (1974)." In *Shaw* this court further stated:

> We nonetheless have maintained that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or "with the legitimate penological objectives of the corrections system," *Pell v. Procunier*, 417 U.S. 817, 822; 41 L. Ed. 2d 495; 94 S. Ct. 2800 (1974). We have thus sustained proscriptions of media interviews with individual inmates, see *Id.*, at 833-835, prohibitions on the activities of a prisoners' labor union, see *North Carolina Prisoners' Labor Union, Inc., supra*, at 133, and restrictions on inmate-to-inmate written correspondence, see *Turner, supra*, at 93. Moreover, because the "problems of prisons in America are complex and intractable," and because courts are particularly "ill equipped" to deal with these problems, *Martinez, supra*, at 404-405, we

> generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge. [*Id.* at 229.]

These reasons similarly support the use of the *Sandin* threshold in the case at hand. In the instant case, where the inmate suffered no adverse consequences of any kind, the Court of Appeals' opinion fails to exercise restraint, contrary to this Court's repeated admonitions, resulting in supervision of the minutiae of prison life. In fact, any reasonable prisoner in Respondent's position would rejoice that the State hearing system worked in his favor and would therefore be encouraged to continue to pursue his right to seek redress of grievances. Therefore no justification exists for expending limited federal judicial resources to micro-manage state prisons in cases like this one. The *Sandin* standard should apply and the Petitioners are entitled to judgment in their favor, since the mere threat of misconduct sanctions cannot be termed an atypical and significant deprivation in relation to the ordinary incidents of prison life.

Another line of authority supports the application of the *Sandin* standard here. Under the test applied by the Court of Appeals here, inmates have more First Amendment protections than do public employees. While the issue of public concern limitation is necessary to accommodate the needs of government to effectively manage provision of public service, *Connick v. Myers*, *supra*, similarly the atypical and significant hardship in relation to the ordinary incidents of prison life limitation is appropriate in the prison context. It will allow prison officials the due deference to accomplish their goals of order, security and rehabilitation. It will afford the inmates appropriate First Amendment protection. And, unlike the Court of Appeals decision in this case, it will not provide inmates with broader protections than those afforded by the First Amendment to government employees.

The test as applied by the Court of Appeals decision in this case, could be construed to allow inmates who file grievances or complaints to inappropriately insulate themselves from the ordinary incidents of prison life. For example, if prison staff need to make room for a prisoner who needs to be separated from an enemy, and the inmate needing protection is transferred into prison A, prison A then needs to transfer a prisoner out to make room for the inmate needing protection. If staff know that prisoners X, Y and Z recently filed grievances against staff, staff may feel compelled to choose other prisoners to transfer out, so that they can avoid the a lawsuit claiming retaliation, that they would likely face if they were to transfer out prisoner X, Y or Z. Thus, though absent the grievance, prisoners X, Y or Z would be candidates to be transferred as would most other prisoners at the facility, by virtue of filing grievances they may insulate themselves from one of the ordinary incidents of prison life, i.e. a routine transfer. It is unjust to prisoners who do not grieve or complain, to exclude X, Y and Z from the pool of prisoners who could be transferred. If the *Sandin* standard were applied, staff would be free to include X, Y and Z in the pool of potential transferees, because a routine transfer is not an atypical and significant deprivation.

Similarly, sometimes managing a facility makes it wise to transfer a prisoner, at least in part **because** the prisoner is a malcontent and filing grievance after grievance. That was the case in *Ward v. Dyke*, 58 F.3d 271 (6th Cir. 1995). In that pre-*Thaddeus-X* case, Prisoner Ward filed dozens of grievances within a few weeks of being housed at the prison. Prisoner Ward's adjustment difficulties interfered with the operation of the facility and created tension in the staff. Prison staff transferred Ward for valid penological reasons: to give Ward a fresh start and to relieve the staff from dealing on a daily basis with this particular malcontent prisoner, without interfering with Ward's right to file grievances. Even if prison staff's actions had a chilling effect on Ward's grievance filings the

court held that, pursuant to *Turner v. Safley*, 482 U.S. 78, (1986), his transfer was permissible because it served a legitimate penological interest. The retaliation test as applied in the instant case, inappropriately fails to consider the role of legitimate penological interests, and it is unclear that prison officials would prevail in a case like the *Ward* case under current Sixth Circuit law. The need to defuse tensions as was permitted in the *Ward* case, is central to prison management, rather than waiting for a physical confrontation that might result from failing to take such action.

In the instant case, valid penological reasons warranted the staff issuing the misconduct ticket: It was an effort to maintain discipline by discouraging inmates from filing frivolous criminal charges that require an investigation, wasting limited resources with no resulting benefit to anyone.

C. Where Respondent's frivolous embezzlement report motivated Petitioners to lodge a misconduct ticket against Respondent, Petitioners' actions did not violate the First Amendment.

After Internal Affairs found no facts to support the Respondent's embezzlement report the Regional Prison Administrator wrote a memo to the warden stating:

> Prisoner Brown, #167009 alleges that AMF staff in prisoner accounting are **embezzling** funds from his account. This allegation has been investigated by Internal Affairs and found to be without merit.
>
> We have been seeing more and more of these false complaints lately. While I believe a prisoner should be able to file a legitimate complaint, they also should be punished for filing false complaints. Therefore, please issue a major misconduct ticket to the prisoner

> regarding this matter. [Court of Appeals Joint App. at 204; *See*, App., p. 37a.]

This is the only evidence showing what motivated the Petitioners to write the misconduct ticket against Respondent. Petitioners agree with the Court of Appeals that to make out a retaliation claim, a prisoner must show that protected conduct motivated defendants in taking the adverse action. Petitioners, however, disagree that Respondent produced any evidence of such motivation. The administrative grievances Respondent wrote that could be construed as protected conduct are irrelevant, because they were not in fact a motivating factor. The Regional Prison Administrator's memo, in which he specifically recognizes the inmate's right to file nonfrivolous grievances makes that very clear.

Therefore the sole motivating factor was the frivolous false embezzlement claim Respondent filed. Respondents agree with the dissent's analysis of this element:

> ". . . [A] prisoner who filed a frivolous complaint or who exercises his right to file grievances in a manner that violates legitimate prison regulations and objectives is not engaged in protected activity, and a prison official does not unlawfully retaliate by taking action against such unprotected conduct. *See Smith* [*v. Campbell*] 250 F 3d [1032] at 1037; *Herron*, [*v. Harrison]* 203 F 3d [410] at 415 [(6th Cir. 2000)]. [*Brown v. Crowley,* at 803.] App., p. 38a.

Respondents, motivated only by the frivolous embezzlement report, therefore, were not motivated by protected conduct. They are therefore entitled to summary judgment.

The analysis that the majority opinion engaged in will require a trial in every case where an inmate files any type of grievance, whether frivolous or not, where the grievance is

followed by any action by a prison official toward the grievant that could be interpreted as having the potential to result in a negative outcome. This is the case no matter how *de minimis* the potential impact. As in this case, a trial is thus mandated despite the fact that the potential negative impact never occurred. This clearly encourages inmates (who need no incentive) to file lawsuits that will result in no benefit to anyone, since no compensable damages need be alleged. The result is the abject waste of substantial judicial and state resources without any corresponding benefit to anyone, will undermine state prison officials' ability to maintain order in the prisons, and will not improve the inmates' ability to obtain redress of grievances. All of these results are contrary to this Court's decision in *Sandin*, and the decision of the Court of Appeals should be reversed.

II. TO DEPRIVE PRISON OFFICIALS OF THIS DISCIPLINARY TOOL WOULD BE CONTRARY TO THIS COURT'S PRECEDENTS.

As Judge Rosen's dissenting opinion notes in the instant case, *Brown v. Crowley* at 808, App., p. 46a, prison administrators are entitled to tools similar to those that judges use to discourage filing frivolous claims, such as the embezzlement claim filed by Respondent:

> Defendants tell us that Michigan prisoners file thousands of grievances each year. It seems safe to assume that at least some of these are frivolous or outright false, and that substantial state resources are wasted in processing such complaints. Moreover, as we recognize the danger that a prison official might use a misconduct charge as a means of retaliating against an inmate, we surely must acknowledge that a prisoner, likewise, might lodge retaliatory charges against prison staff, with the result that personnel are

> diverted from their usual tasks to address these charges, at considerable expense to the taxpayers. It stands to reason, then, that prison officials must be given the tools to deter such complaints, including the authority to take disciplinary action against inmates who file them.

In *Washington v. Harper*, 494 U.S. 210 at 224 (1990), this Court made it crystal clear that the standard for reviewing any prison regulation that allegedly impinges on **any** Constitutional right is whether the regulation is "reasonably related to legitimate penological interests." If the Court of Appeals opinion is left undisturbed, the result will be that prison officials are effectively stripped of the benefit of this misconduct charge in their efforts to control the waste of prison resources occasioned by baseless claims of embezzlement or other misconduct by staff. If, each time a prisoner is found "not guilty" of the misconduct charge of interference with administration of rules, prison administrators can anticipate a lawsuit claiming retaliation, prison administrators will likely conclude that the costs for pursuing the misconduct charge are too high. As a result, they will abandon the use of this tool while similar tools are available to the courts. This result would be contrary to *Turner v. Safley* and *Washington*, since the interference with administration of rules misconduct clearly serves the same legitimate government interests as do Fed. R. Civ. P. 11, 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1927.

By defining an inmate's First Amendment retaliation claim to require that the inmate plead an atypical and significant deprivation in relation to the ordinary incidents of prison life, and by requiring that the inmate prove a nonfrivolous grievance with merit was a motivating factor in retaliating against the him, this Court would afford prison officials due deference in managing the prisons, and still provide appropriate First Amendment protection to inmates.

CONCLUSION

Wherefore, Petitioners request that this Honorable Court grant their petition for a writ of certiorari to define the elements of a prisoner's First Amendment retaliation claim in order to appropriately balance the management needs of prison officials with the First Amendment rights of prisoners. This definition is necessary to conform with this Court's precedents.

Respectfully submitted.

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